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No. 94-934

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

WALTER F. LISEK,

Petitioner,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY, a corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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APPENDIX

Appendix A — Decision of the Appellate Court of Illinois, Fifth District in *Hiles v. Norfolk and Western Railway Company* Filed December 29, 1994 ..... 1a

FURTHER REASONS FOR GRANTING THE WRIT

The decisions below are contrary to the holdings of this Court, contrary to all of the decisions of the courts of last resort of every state which has decided the issue, and contrary to the holdings of several of the United States courts of appeals. Supreme Court Rule 10.1.(a)

The decision of the Seventh Circuit ignored the precedent of this Court as set out in numerous cases, including, *Johnson v. So. Pac. Co.*, 196 U.S. 1 (1904); *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430 (1949); *Atlantic City R.R. Co. v. Parker*, 242 U.S. 56 (1916); and *San Antonio & A. P. Ry. Co. v. Wagner*, 241 U.S. 476 (1916); The Seventh Circuit misapplied *dicta* in *Affolder v. New York, C. & St. L. R. Co.*, 339 U.S. 96 (1950), did not perform any legislative research, choosing instead a view of the legislative history as set forth in *United Transportation Union v. Lewis*, 711 F.2d 233 (D.C.Cir. 1983) and joined a recent line of cases, which is broken and which narrow the application of the FELA and the SAA in contrast to their remedial purposes, .

Upon his separate FELA claim, Lisek raised sufficient evidence of negligence to avoid the entry of summary judgment against him. His affidavit should not have been stricken.

I. The "Modern Trend" of the Circuit Courts Is Contrary to Established Law. The Attempt to Distinguish Between An Equipment and An Operations Statute Is Fallacious Logic.

The railroad, and each of them, can only hope that this Court will join lower courts in sweeping this law from existence since Congress has not done so.[1] *Lewis* is apparently the font whence

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1. The bill was approved by a vote of the Senate: 39 yeas, 10 nays, and 38 not voting. 24 Cong. Rec. 1486 (February 11, 1893). By a vote of 185 yeas to

(Cont'd)

springs the "modern trend." In stark contrast to the previous decisions of the state courts of last resort and of the United States court of appeals, United States courts of appeals since *Lewis*, with the exception of the Sixth Circuit decision in *Clark*, have ignored precedent of vintage and chosen to go with a narrow view of the safety statute. This case presents this Court with a clear opportunity to resolve the split in authority between the United States courts of appeals, as well as between certain of the United States courts of appeal and all of the state courts of last resort. It affords this Court an opportunity to make clear its *dicta* in *Affolder*, which has been interpreted in two distinct ways.

The railroad urges that *Lewis* controls this matter. Therein is the "Achilles's heel" of the railroad's argument, for in performing the task which led to his injury, about the only portion of Lisek's body not between the cars was his right foot, ankle and lower shin. Somehow this follows exactly the coupling procedure set forth in *Lewis*, wherein the use of a coupling hook whereby the worker had to reach in between the cars with his arm and shoulder to open the knuckle was held not violative of the Act in the union's challenge to the procedure. This is the same mysterious math whereby open coupler = aligned drawbar[2], even though the coupler can be manipulated from outside the cars and the drawbar may only be aligned, at least on the subject car (and most other rail cars), from between the cars.

(Cont'd)
84 nays, with 60 not voting, the House of Representatives approved the Senate amendments. 24 Cong. Rec. 2247-48 (February 27, 1893). Since its passage, it appears to have been amended only once, deleting the words "common carrier in interstate commerce by" from between the words "any" and "railroad," and deleting the words "used in interstate traffic" from between the words "any car" and "not equipped." (45 U.S.C. § 2; as amended June 22, 1988, Pub.L. 100-342, § 13(1)(B).

2. Respondent's Brief in Opposition, p. 18.

The district court case from the Ninth Circuit, *Towles v. Burlington Northern R.R. Co.*, 1994 W.L. 151073 (E.D. Wash. 1994), essentially supports the proposition that summary judgment was improper here. Both parties moved for summary judgment: the railroad because it believed that misalignment was a defense, the worker because he believed that misalignment was a violation. Neither party won at that level, the court left the matter to be resolved by a jury. (Respondent's App.-25). Although the Court does not say whether or not a misaligned drawbar without more is a defective appliance, nor does it say that it is not.[3]

Withal, the railroad's argument continues to ignore or give short shrift to the opinions of this Court, particularly the legislative research done by the *Johnson* court. Unless the teaching of the nation's schools is incorrect, this Court is the highest judicial authority in the land, the Congress is the legislative authority, and the President the executive authority. By the railroad's argument, it would appear that the circuit courts, divided though they may be on this federal question, are the arbiters supreme of the law of the land, especially where nine-sixteenth's of the circuit courts favor the railroad's position[4].

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3. *Smith v. Aberdeen, Carolina and Western Ry. Co.*, 859 F. Supp. 188 (W.D.N.C. 1994) is a good example of the inequities brought on by the split in the Circuits, let alone the devastating effect of such a narrow decision upon a worker who went to his duties thinking he was afforded protection for injuries under the law. The holding smacks of judicial activism with a reverse impact upon the party whom Congress sought to afford a remedy.

4. Among the Circuits: the Third, Fourth, Fifth and Seventh favor the railroad; the Second, Eighth (upon whose *Muldowney* opinion this Court denied certiorari, 317 U.S. 700) and Tenth (upon whose opinion, *Metcalfe*, this Court denied certiorari, 351 U.S. 908) take the employee's position, and the Sixth appears to be split. Thus we have 4 1/2 v. 3 1/2 = 9/16 for the railroad and 7/16 for the employee. If *Kavorkian* overrules *Clark*, and it does not expressly do so, then 5/8 of the Circuits now favor the railroad.

Further, the railroad does not address the plain split in authority between the various circuits and the Supreme Courts of the various states, which, as noted in the petition and the opinion below, uniformly hold that a misaligned drawbar, without more, is evidence of a violation of the Act.[5]

> Mr. President, it has been intimated that Congress has no power to deal with this question.. There is no other power that can deal with it successfully. Take the State of Illinois, for instance; that State may pass all the laws it pleases with reference to cars operating in Illinois, but those cars go all over the country. You will find an Illinois car in Massachusetts, a Massachusetts car in Georgia and on the Pacific Coast, and they are mingled together everywhere. Hence it is that Congress is the only power that can regulate the subject and protect the lives and limbs of these men.

24 Cong. Rec. 1275 (February 7, 1893).

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5. On December 29, 1994, the Appellate Court of Illinois, Fifth District, handed down its decision in *Hiles v. Norfolk and Western Ry. Co.*, No. 5-93-0775, wherein it recognized the split in the federal circuit courts and chose to stand by its previous decisions, including *Buskirk v. Burlington N., Inc.*, 431 N.E. 2d 410, 412, *cert. denied*, 459 U.S. 910 (1982), in upholding a directed verdict for the plaintiff where the plaintiff showed no more than injury while aligning a drawbar. Referenced in the opinion is *Coleman v. Burlington N., Inc.*, 681 F.2d 542, 544-45 (8th Cir. 1982), which itself follows a long line of cases beginning with *Southern Pacific Co. v. Mahl*, 406 F.2d 1201 (5th Cir. 1969), wherein it is held to be a violation of the SAA if a worker injures himself while operating a pin lift lever regardless of whether the worker goes between the cars to get the knuckle to open. Acceptance of the opinion below would defenestrate this line of cases, too.

. . . [T]here are about forty different patent couplers which work together, that is to say, either one of which will couple with the other automatically. . . . [I]f 75 per cent of the companies should vote for a particular coupler, that is to say, a particular type of coupler, the balance under the bill would have to adopt a type that would couple with it. It would not necessarily be the same patent, but whatever device coupled with that car without making it necessary that the switchman should go between the cars I understand the bill would allow to be used.

. . . [M]ost of the railroads, and I might say all of them, insist that they are doing the best they can. I agree that they say that, but while they are saying that, not one-third of the freight cars of the country are equipped with those brakes or couplers. While that is true, and while the railroads are going forward at their own gait putting some on every year, the laboring men, the employes of the roads, the switchmen, the yardmen, the men upon the tops of the cars, are complaining that the roads are not putting them on as rapidly as they ought to be put on. . . . [W]hile the railroad companies insist that they are doing the best they can, they are looking to their finances more than to the protection of life and the security of limb of the men operating their trains.

24 Cong. Rec. 1274 (February 7, 1893)

At another point in the discussions of this bill on the House floor, testimony was read to the body from a switchman who preferred the old link and pin coupler, primarily because it at least was uniform in height and operation. 24 Cong. Rec. 1974-75 (Feb. 21, 1893). The proponents of the bill countered this testimony with information that this "practical railroader" now held a politically appointed job in the Treasury department, and was also the holder of a patent for a link and pin coupling device of which he "presented a brass model to us in the committee. [Laughter and applause.]" (*Ibid.* p. 1978). The proponent of the switchman's testimony later countered this with several letters from the testifier denying the charge laid by the proponents of the bill. 24 Cong. Rec. 2246-47 (Feb. 27, 1893). Opponents of the bill argued strenuously that requirements such as the height of drawbars and the use of automatic couplers would require tremendous expense on the part of the railroads. 24 Cong. Rec. 2246 (Feb. 27, 1893).[6]

While the SAA has not made the railroad's happy, it has granted to the worker some protection. Regardless of the individual's position on whether the SAA and the FELA are anachronistic and should be replaced with some other system, they were and continue to be the law of the land. A recent flurry of decisions in this area points out that the law is not settled although

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6. Full debates on the floor of the respective Houses of Congress are recorded in Volume 24 of the Congressional Record: for the Senate, February 7, 1893, at pages 1273 to 1289; for the House, February 27, 1893, at pages 2242 to 2248. Proponents talked of the loss of life and limb due to the broad variety of equipment, and the link and pin coupler; opponents talked of the constitutionality of the bill, the railroad's advances on these lines, the switchmen's opposition to change from a known system, and the expense of making the change. The height of drawbars was considered, but not their movement, and cases of that era, *Johnson*, *Parker* and *Wagner*, suggest that at that time little movement was countenanced. As movement possible in drawbars changed, the mandate of Congress did not.

it was well settled until recent time, and it further points to a trend away from the protection of the worker in favor of little or no liability for the railroads. The current situation fosters inequitable results and forum shopping, as well as uncertainty for all involved. This Court should take this opportunity to clarify a point of law which has split the courts.

II. Lisek Successfully Preserved His Case Against the Entry of Summary Judgment. His Affidavit Should Not Have Been Stricken.

This Court favors jury resolution of cases arising under the FELA. *See, Tennant v. Peoria*, 321 U.S. 29 (1944); *Lavender v. Kurn*, 327 U.S. 327 (1946); and *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500 (1957) Plaintiffs need only prove that the railroad was the slightest cause in order to recover. *Crane v. Cedar Rapids & Iowa City Ry. Co.*, 395 U.S. 164 (1969) While Lisek did not present overwhelming evidence of the railroad's negligence at the district court level, he provided more than the "scintilla" which the circuit court states he failed to offer. (Petitioner's Appendix, 26a) Lisek described the lack of appropriate tools, the presence of grease on the tie (corroborated by the presence of grease on his pants' leg), overgreasing the drawbar, and that various of the railroad's explanations for the "innocent" sluing of the drawbar were in fact evidence of negligence on the part of the company and its employees. These arguments fell on deaf ears.

Similarly, Lisek's affidavit was summarily dismissed without reason by the district court. The Seventh Circuit failed to address the issue. The affidavit was clearly based on the personal knowledge of Lisek, a switchman with eight years experience in the yard, and primarily went to the issue of whether any coupling had been attempted when the car, 19th in a line of 26 cars, was first placed into the subject switching track.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari to the Seventh Circuit. This is a matter of federal legislation in which the circuit courts are divided, and in which the Seventh Circuit is in direct conflict with the decisions of each court of last resort of the states which has heard the issue, including the State of Illinois, where the Seventh Circuit sits and where this case arose. Lisek has raised sufficient factual questions upon which he has the burden of proof at trial so that the grant of summary judgment against him was error, as was the striking of his affidavit.

Respectfully submitted,

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APPENDIX A — DECISION OF THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT IN *HILES V. NORFOLK AND WESTERN RAILWAY COMPANY* FILED DECEMBER 29, 1994

LOUIS E. COSTA
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STATE OF ILLINOIS
APPELLATE COURT
FIFTH DISTRICT
14TH & MAIN STREETS
MT. VERNON 62864

December 29, 1994

Thomas W. Alvey, Jr.
Thompson and Mitchell
525 West Main Street
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RE: Hiles v. Norfolk and Western Ry. Co.
Gen. No. 5-93-0775
Madison County No. 91L1605

Dear Counsel:

Enclosed please find a copy of the decision in this cause which was filed today in this Court.

Very truly yours,

s/ Louis E. Costa
Louis E. Costa, Clerk

Appendix A

LEC/jfa
Enclo.
cc: Lance Callis
Jeanne L. Sathre
Hon. Phillip J. Kardis

Appendix A

NO. 5-93-0775

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

WILLIAM J. HILES,

Plaintiff-Appellee,

v

NORFOLK AND WESTERN RAILWAY, COMPANY, a Corporation,

Defendant-Appellant.

Appeal from the Circuit Court of Madison County.

No. 91-L-1605

Honorable Phillip J. Kardis, Judge, presiding.

JUSTICE WELCH delivered the opinion of the court:

On December 26, 1991, William J. Hiles (plaintiff), filed a one-count complaint against the Norfolk & Western Railway Company (defendant) in the circuit court of Madison County. Plaintiff brought his action under the Federal Safety Appliance Act (Safety Appliance Act) (45 U.S.C.S. sec. 1 *et seq.* (Law. Co-op 1981 & Supp. 1994)). In relevant part, it was alleged:

"3. That on July 18, 1990, the plaintiff ***

> was working as a member of a switching crew located at Defendant's St. Louis Yard, at or near St. Louis, Missouri. At that time, in the course and scope of his duties, he was required to go between two railroad cars to straighten a misaligned draw bar and was injured attempting to "straighten" said drawbar, all in violation in whole or in part of the aforesaid Safety Appliance Act."

On May 20, 1993, defendant filed an amended answer raising, *inter alia*, the affirmative defense that "plaintiff's claim that the drawbar or coupler was not aligned was a result of simple misalignment and not the result of defective equipment." Also on May 20, 1993, defendant filed a motion for summary judgment and a supporting memorandum of law. In pertinent part, defendant's memorandum states:

> "Plaintiff has filed a cause of action for injuries allegedly resulting from realigning a drawbar between rail cars. Plaintiff *** has not presented any evidence of a defective drawbar or coupler system. Plaintiff claims per se liability under the Federal Safety Appliance Act based on a slewed drawbar.
>
> [Defendant] has clearly established, through the Affidavit of General Foreman Walter A. Miller, Jr., the drawbar and coupler involved in the subject occurrence were not defective at the time of plaintiff's alleged injury. This evidence is uncontested.

> If [defendant] can prove the slewed drawbar was cause [*sic*] by something other than defective equipment, it will avoid liability under the Safety Appliance Act."

The trial court denied defendant's motion for summary judgment. Relying on *Buskirk v. Burlington Northern, Inc.* (1982), 103 Ill. App.3d 414, 431 N.E.2d 410 (railroad held liable as a matter of law under the Safety Appliance Act where employee went between railcars and injured his back while struggling to realign a drawbar that had failed to automatically couple), plaintiff filed a motion for directed verdict on May 20, 1993. According to plaintiff, the evidence was uncontradicted that "he went between two cars which failed to couple automatically and *** while aligning a misaligned drawbar, he was injured." As a result, plaintiff concluded that he was entitled to a directed verdict based upon this court's *Buskirk* decision.

The trial court agreed and granted plaintiff's motion for a directed verdict on the issue of liability. Defendant made an offer of proof that consisted of the testimony of two employees. Walter Miller, a general foreman, stated that his inspection did not reveal any kind of mechanical defect in the drawbar on the car involved in plaintiff's injury. Larry Fauver, a switchman who was working with plaintiff at the time of the injury, stated that the drawbar was slued. Defendant also submitted plaintiff's discovery deposition and certified questions and answers in support of the offer of proof.

On May 21, 1993, defendant filed a motion for a directed verdict at the conclusion of all the evidence. The trial court denied the motion, and the jury returned a verdict in favor of plaintiff. Defendant's posttrial motion was denied on October 21, 1993.

Appendix A

On appeal, defendant argues that the trial court erred: (1) by allowing plaintiff to present evidence of a *per se* violation of the Safety Appliance Act without requiring a showing of a defect in the drawbar or coupler and further erred by directing a verdict in favor of the plaintiff on the issue of liability; and (2) when it improperly excluded evidence that the misaligned drawbar was not caused by defective equipment or that it was caused by something other than defective equipment and further erred by denying the defendant's motions for directed verdict on the issue of its liability under the Safety Appliance Act. We disagree.

The operative section of the Safety Appliance Act upon which this case was tried makes it "unlawful for any such railroad [engaged in interstate commerce by railroad] to haul or permit to be hauled or used on its line any car not equipped with couplers coupling auto-matically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." (45 U.S.C.S. sec. 2 (Law. Co-op Supp. 1994).) The purpose of section two is "to obviate the risks to employees by reason of their going between railroad cars to manually couple and uncouple them." *Leveck v. Consolidated Rail Corp.* (1986), 148 Ill. App.3d 118, 123, 498 N.E.2d 529, 532.

To get an idea of how the mechanics of "coupling" operate, we quote the following explanation:

> "Each rail car has a coupling mechanism located on each end which allows cars to be connected with other cars. The standard coupling mechanism consists of a knuckle attached to a drawbar. The drawbar is in turn attached to the rail car. The knuckle is a clamp which can be opened and closed as required

> and is designed to couple automatically with another knuckle on impact when the couplers are properly aligned. The drawbar has several inches of lateral play so that the rail cars can negotiate turns without derailing. However, because of the lateral play, the knuckles occasionally become misaligned and may fail to couple automatically upon impact. No device has been developed for wide-spread use that would automatically align the drawbars." *Goedel v. Norfolk & Western Ry. Co.* (4th Cir. 1994), 13 F.3d 807, 809.

It is well established that in construing the Federal Employer's Liability Act and the Safety Appliance Act, as with other Federal statutes, this court must look to Federal decisions for guidance and interpretation. (See, *e.g., Bailey v. Central Vermont Ry., Inc.* (1943), 319 U.S. 350, 352, 87 L.Ed. 1444, __, 63 S. Ct. 1062, 1063; *Boyer v. Atchison, Topeka & Santa Fe Ry. Co.* (1967), 38 Ill.2d 31, 34, 230 N.E.2d 173, 176; *Templeton v. Chicago & Northwestern Transportation Co.* (1991), 211 Ill. App.3d 489, 495, 570 N.E.2d 467, 471, *rev'd on other grounds* (1992), 151 Il1.2d 325, 603 N.E.2d 441.) Two purposes are served by a rule requiring application of Federal decisional law: (1) preventing the erosion of rights conferred by Federal law and (2) achieving uniformity. *Bowman v. Illinois Central R.R. Co.* (1957), 11 Ill.2d 186, 226, 142 N.E.2d 104, 127.

At the outset, we note that there is no uniformity in the case law on the issue of whether a misaligned drawbar, absent evidence of defective coupling equipment, constitutes a violation of the Safety Appliance Act. "The malfunctioning and misalignment of rail car couplers has received varied treatment

from the federal courts over the years." (*Goedel*, 13 F.3d at 810.) There are two lines of cases addressing this issue.

Under one line of cases, there is no violation of the Safety Appliance Act if the coupling equipment is nondefective. Thus, the existence of a misaligned drawbar, in the absence of proof of defective coupling equipment, is not a violation of the Safety Appliance Act. *Kavorkian v. CSX Transportation, Inc.* (6th Cir. 1994), 33 F.3d 570, __ ; *Lisek v. Norfolk & Western Ry. Co.* (7th Cir. 1994), 30 F.3d 823; *Goedel*, 13 F.3d at 811-12; *Reed v. Philadelphia, Bethlehem & New England R.R. Co.* (3d Cir. 1991), 939 F.2d 128, 132; *Maldonado v. Missouri Pacific Ry. Co.* (5th Cir. 1986), 798 F.2d 764, 768.

Under the second line of cases, to which two Federal circuits currently adhere, a railroad is liable for injuries under the Safety Appliance Act when cars fail to automatically couple due to a misaligned drawbar. (*Coleman v. Burlington Northern, Inc.* (8th Cir. 1982), 681 F.2d 542, 544-45; *Metcalfe v. Atchison, Topeka & Santa Fe Ry. Co.* (10th Cir. 1974), 491 F.2d 892, 896-97; *Kansas City Southern Ry. Co. v. Cagle* (10th Cir. 1955), 229 F.2d 12, 1415.) As the Seventh Circuit recently observed in *Lisek*, "The state courts have *** overwhelmingly held that a failure to couple due to drawbar misalignment constitutes a violation of the [Safety Appliance Act]." *Lisek*, 30 F.3d at 827 (citing cases from California, Illinois, Michigan, Minnesota, Missouri, Montana, New York, and Utah).

This court has repeatedly held that a railroad is liable as a matter of law under the Safety Appliance Act when an employee goes between railcars and is injured while attempting to force back into position a drawbar that has failed to automatically couple, regardless of whether the coupling equipment is

defective. *Pry v. Alton & Southern Ry. Co.* (1992), 233 Ill. App.3d 197, 214, 598 N.E.2d 484, 496; *Leveck*, 148 Ill. App.3d at 123, 498 N.E.2d at 532; *Reynolds v. Alton & Southern Ry. Co.* (1983), 115 Ill. App.3d 88, 95, 450 N.E.2d 402, 408; *Buskirk*, 103 Ill. App.3d at 415, 431 N.E.2d at 412.

The principal question in this case is whether this court should, as defendant suggests, abandon our longstanding authority permitting a plaintiff such as Hiles to recover under the Safety Appliance Act for injuries sustained while attempting to align a misaligned drawbar. Having carefully considered all the applicable cases and the arguments advanced by the parties, we decline defendant's invitation to overrule *Buskirk*.

There is currently no uniformity among the Federal circuits on the question raised in this case. We are not required, as defendant intimates throughout its brief, to follow the rule enunciated by the Third, Fourth, Fifth, Sixth, and Seventh Circuits. Until such time as the Eighth and Tenth Circuits overrule *Coleman* and *Metcalfe*, or until the United States Supreme Court resolves the issue, we will adhere to *Buskirk* and the line of Federal cases upon which it is predicated.

Because we have resolved the first issue in plaintiff's favor, the outcome of the second issue is preordained. Plaintiff was entitled to a directed verdict on the issue of liability. (See *Reynolds*, 115 Ill. App.3d at 95, 450 N.E.2d at 408; *Buskirk*, 103 Ill. App.3d at 415, 431 N.E.2d at 412.) All a plaintiff such as Hiles is required to show in order to obtain a directed verdict on the issue of liability is that: (1) railroad cars failed to couple automatically and (2) he went between the cars and was injured while trying to straighten a misaligned drawbar. (*Buskirk*, 103 Ill. App.3d at 415, 431 N.E.2d at 412.) Plaintiff met these

requirements in the instant case and was thus entitled to a directed verdict. Based upon our review of the record, the trial court did not err in granting a directed verdict on the issue of liability. See *Pedrick v. Peoria & Eastern R.R. Co.* (1967), 37 Il1.2d 494, 510, 229 N.E.2d 504, 513-14 (directed verdict is proper only when all of the evidence, viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on the evidence could ever stand).

For the aforementioned reasons, we hereby affirm the judgment entered by the circuit court of Madison County.

Affirmed.

GOLDENHERSH and LEWIS, JJ., concur.